value of the production of mineral lands cannot be sustained as an excise tax.[19] Moreover, calling the tax one upon an occupation cannot change its character if the effect is to produce the result just described.[20]

The same question is raised in a recent Kentucky case, where a tax upon the occupation of removing spirits from bond was held unconstitutional when levied upon an owner.[21] Whiskey while it remains in bond is as little capable of use as unmined minerals; so the decision is in accord with the previous authority. It seems difficult to find a rational distinction between taxation of every speculatively possible use, and of nearly every beneficial use. No court has attempted an explanation. Probably all that can be said is that taxation of the latter is an excise *ex vi termini*, while the former appears to come so close to taxing mere ownership that it can be considered as nothing else.

DISCRETION IN *QUO WARRANTO* AGAINST A PUBLIC CORPORATION.—*Quo Warranto* is the appropriate mode of inquiry by what right a body of individuals or an alleged corporation[1] exercises the functions and franchises of a municipal or other public corporation;[2] or of testing the right of an individual to hold office in such a corporation.[3] The normal result of a finding that such franchises have been usurped is a judgment of ouster,[4] terminating at once the activities of the *de facto*[5] officer or corporation.[6] Occasionally, however, a municipality technically void has existed so long and under such circumstances that the public good is better served by the uninterrupted user of the usurped franchises

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[19] Large Oil Co. *v.* Howard. 63 Okla. 143, 163 Pac. 537 (1917). *Contra*, Raydure *v.* Board of Supervisors, 183 Ky. 84, 99, 209 S. W. 19, 26 (1919). Bnt see State *v.* Cumberland & Pennsylvania R. R. Co., 40 Md. 22 (1873).

[20] Thompson *v.* McLeod, 112 Miss. 383, 73 So. 193 (1916).

[21] Craig *v.* E. H. Taylor, Jr., & Sons, 232 S. W. 395 (Ky.). For the facts of this case see RECENT CASES, *infra*, p. 94. The United States Supreme Court had previously reached the same result, as a matter of Kentucky law. Dawson *v.* Kentucky Distilleries Co., 41 Sup. Ct. 272 (1921). If there had been an occupation of attending to the formalities of taking spirits out of bond for owners it would seem to be a valid tax.

[1] That the corporation *de facto* is the proper party defendant: State *v.* Leischer, 117 Wis. 475, 94 N. W. 299 (1903); State *v.* Atlantic Highlands, 50 N. J. L. 457 (1888). *Contra:* State *v.* Small, 131 Mo. App. 470, 109 S. W. 1079 (1908).

[2] State *v.* City of Birmingham, 160 Ala. 196, 48 So. 843 (1909); State *v.* Atlantic Highlands, *supra;* State *v.* Bradford, 32 Vt. 50 (1859). See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., 641; 2 DILLON, MUNICIPAL CORPORATIONS, 4 ed., § 890; also cases in note 12, *infra*.

[3] Darley *v.* Queen, 12 Cl. & F. 520 (1845); Comm. *v.* Allen, 128 Mass. 308 (1880). Occasionally this is made the method of an indirect attack upon the validity of the municipality itself. State *v.* Leischer, *supra*. But when at the instance of a private relator under the Statute of Anne, it is restricted by the court's power in its sound discretion to refuse to allow the information to be filed. King *v.* Trevenen, 2 B. & Ald. 479 (1819). See also note 9, *infra*.

[4] State *v.* Bradford, *supra*. And see State *v.* Woods, 233 Mo. 357, 135 S. W. 932 (1911), where judgment of ouster issued as of course.

[5] The American doctrine seems to be that a *de jure* municipal corporation can be extinguished only by legislative enactment. See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., 637; Cain *v.* Brown, 111 Mich. 657, 70 N. W. 337 (1897).

[6] See HIGH, *op. cit.*, 697, 701.

than by the vindication of the bare right of the state. It is therefore held in a recent Massachusetts case [7] that the court may in its sound discretion decline to issue process in *quo warranto* to such a corporation even though at the instance of the Attorney General acting *ex officio*.

The original writ of *quo warranto* and the information which superseded it, being at the common law matters of royal prerogative,[8] were down to the time of the statute of 9 Anne, c. 20 [9] unhampered by any discretionary powers in the courts, and this rule has in the case of *ex officio* proceedings by the Attorney General continued in England [10] and is still the weight of authority in this country.[11] Both were and are the machinery of the common law and not of equity,[12] and the bill in equity is not a proper substitute therefor.[13] And yet, to meet a growing recognition that the state has an interest in the continuous operation of the smaller units within itself which play so large a part in direct governmental relations with the individual,[14] as well as an interest in the regulation of the extraordinary powers usually to be exercised only under franchise, there has been a tendency by statute and decision to assimilate *quo warranto* to equitable jurisdiction, at least in so far as the exercise of sound discretion upon balanced interests is a pervading feature of such jurisdiction.

This discretion may conceivably be exercised at either of two stages of the suit: at the preliminary stage of the issuance of process, filing of information, or other substitute for the original writ out of chancery; or at the hearing on pleadings or trial after issue joined. The common example at the first stage has been in cases brought by private relators

[7] Att'y Gen'l *v.* City of Methuen, 236 Mass. 564, 129 N. E. 662 (1921). For the facts of this case see RECENT CASES, *infra*, p. 92.

[8] See HIGH, *op. cit.*, 554. See also the discussion in Att'y Gen'l *v.* Sullivan, 163 Mass. 446, 447–449, 40 N. E. 843, 844–845 (1895), which is probably historically accurate although seemingly shaken as authority in Massachusetts by the holding of the principal case.

[9] The statute of 9 ANNE, c. 20 (1710), authorized the filing of informations in the nature of *quo warranto* by an officer of the court at the relation of a private person against any person usurping an office or franchise within a municipality. This privilege is by the terms of the act subject to the leave of the court, which is the first introduction of the element of discretion into *quo warranto* proceedings, except as there was an original discretion in the Attorney General as to the initiation of *ex officio* proceedings, or possibly in the King's attorney as to any rare cases at private relation before the statute. See Darley *v.* Queen, 12 Cl. & F. 520 (1845). It did not extend to proceedings against a municipality itself, Rex *v.* Carmarthen, 2 Burr. 869 (1759); any more than against a private corporation, King *v.* Ogden, 10 B. & C. 230 (1829). And the discretion of the court was exhausted upon allowing the information to be filed. See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., 560.

[10] King *v.* Trevenen, 2 B. & Ald. 479 (1819).

[11] See note 17, *infra*.

[12] State *v.* Alt, 26 Mo. App. 673 (1887); Att'y Gen'l *v.* Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371 (1817). And the situation is not altered by the merging of the remedy in the general remedy by action under the Code. People *v.* Albany, etc. R. R. Co., 57 N. Y. 161 (1874).

[13] See People *v.* Clark, 70 N. Y. 518 (1877). See also cases in note 14, *infra*.

[14] This policy is also exemplified in abundant authority to the effect that the validity of the organization of a public corporation cannot be attacked collaterally, but only by direct proceedings in *quo warranto*. Bateman *v.* Florida, etc. Co., 26 Fla. 423, 8 So. 51 (1890) (bill in equity); People *v.* Powell, 274 Ill. 222, 113 N. E. 614. (1916) (ground of demurrer in mandamus); Nelson *v.* School District, 181 Iowa, 424, 164 N. W. 874 (1917) (bill in equity).

under the Statute of Anne,[15] and similar American statutes.[16] But as proceedings against a *de facto* municipality were not within the scope of the statute, and as those suits which had to be instituted by the Attorney General in behalf of the sovereign might be commenced as matter of right without leave of court,[17] there has been little opportunity to apply to cases of such corporations the rules of discretion worked out under the statute.[18] There is, however, strong modern authority that lapse of time, coupled with acquiescence or recognition by the state, may at the second stage of a proceeding in *quo warranto* constitute a valid defense even against the state.[19] The most significant statement of the

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[15] 9 ANNE, c. 20.

[16] The statute of 9 ANNE, c. 20, was early said to be one of the American common-law statutes. See GALE, LIST OF ENGLISH STATUTES SUPPOSED TO BE APPLICABLE TO THE SEVERAL STATES OF THE UNION. But see Comm. *v.* Murray, 11 S. & R. (Pa.) 73 (1824). And either at common law or by enactment it is quite generally in force in the United States. See 2 DILLON, MUNICIPAL CORPORATIONS, 4 ed., § 888, n. 2.

[17] King *v.* Trevenen, 2 B. & Ald. 479 (1819); State *v.* Bryan, 50 Fla. 293, 39 So. 929 (1905); State *v.* St. Louis, etc. Ins. Co., 8 Mo. 330 (1843); Meehan *v.* Bachelder, 73 N. H. 113, 59 Atl. 620 (1904); State *v.* Seymour, 67 N. J. L. 482, 51 Atl. 719 (1902). And see People *v.* Union El. R. R. Co., 269 Ill. 212, 226, 110 N. E. 1, 6 (1915). But see State *v.* Leatherman, 38 Ark. 81 (1881); and also the principal case of Att'y Gen'l *v.* City of Methuen, *supra*.

If the last named case is to be taken as holding that the court may in its sound discretion dispose of an information in *quo warranto* by the Attorney General *ex officio*, at the outset similarly to the procedure under the Statute of Anne in cases of private relators, it must overrule the language at least of a long line of Massachusetts cases holding no leave of court necessary for the filing of such an information. Goddard *v.* Smithett, 3 Gray, 116, 122–123 (1854); Comm. *v.* Allen, 128 Mass. 308 (1880); Att'y Gen'l *v.* Sullivan, 163 Mass. 446, 448, 40 N. E. 843, 844 (1895); Haupt *v.* Rogers, 170 Mass. 71, 48 N. E. 1080 (1898). And if so, it is supported in that position only by language of State *v.* Leatherman, *supra*, out of the many cases cited by the court. All the rest are either cases of private relation, or go on the basis of laches and are determined at the second stage of the suit; and even State *v.* Leatherman, *supra*, is commonly cited as a case of laches. See State *v.* City of Des Moines, 96 Iowa, 521, 65 N. W. 818 (1896); People *v.* Long Beach, 155 Cal. 604, 102 Pac. 664 (1909). Yet the court seems to reject any doctrine of laches running against the state, and the only other interpretation would be a ruling that the court has a general discretion in the second stage of the suit to refuse relief, a doctrine never sounded even in cases of private relation under the statute. See HIGH, *op. cit.*, 560; People *v.* Union El. R. R. Co., *supra*, 232. The decision, which in respect of citation of authorities is characterized by bulky inaccuracy, is therefore rather unsatisfactory in legal technique although reaching an entirely desirable result.

[18] The Illinois statute requires leave of court for filing any information in the nature of *quo warranto*, the judge to be satisfied of "probable ground" for the proceeding. See ILLINOIS REV. STAT. (HURD), c. 112. This is construed as merely requiring the petition to show a *prima facie* case, and not as authorizing the court to consider the merits at the preliminary stage of the suit. People *v.* Union El. R. R. Co., *supra*, note 17. But the question of laches may be raised at trial on the merits. See *infra*, note 19.

[19] State *v.* Leatherman, 38 Ark. 81 (1881); State *v.* School District No. 108, 85 Minn. 230, 88 N. W. 751 (1902); People *v.* Union El. R. R. Co., 269 Ill. 212, 110 N. E. 1 (1915); State *v.* Westport, 116 Mo. 582, 22 S. W. 888 (1893); State *v.* Mansfield, 99 Mo. App. 146, 72 S. W. 471 (1903); State *v.* Lincoln St. Ry., 80 Neb. 333, 114 N. W. 422 (1907). And see possibly in accord by implication: People *v.* Long Beach, 155 Cal. 604, 102 Pac. 664 (1909). *Contra:* Comm. *v.* Allen, 128 Mass. 308 (1880); State *v.* Port of Tillamook, 62 Ore. 332, 124 Pac. 637 (1912); State *v.* Pawtuxet Co., 8 R. I. 521 (1887); State *v.* Wofford, 90 Tex. 514, 39 S. W. 921 (1897). Of course cases of laches by private relators are to be distinguished. See, for example, People *v.* Keigwin, 256 Ill. 264, 100 N. E. 160 (1912).

rule is by the Illinois court,[20] where an exception to the principle that no laches can bar the state is said to arise when injury to the public may come from assertion of the right of the state. This must be taken not as conferring unlimited discretionary powers, but as indicating when the question of laches may properly be raised. It evinces, however, a liberal attitude towards that question. The superficial distinction between the "public" and "state" is but a way of indicating the cross-interests[21] of the state which are weighed in this connection. That this is a somewhat different problem from that involved in cases under the statute of 9 Anne, c. 20, appears from comparison of the elements considered respectively in these cases of "laches,"[22] and in those of general discretion to allow suits at private relation.[23] An obvious altering of the balance follows the elimination of the private interests of the relator. The trend seems towards a further inroad upon the prerogative and a widening of the discretionary field,[24] but it will be interesting to see if this newer discretion will itself be gradually crystallized into sub-rules as was, for example, by analogy with the statute of limitations, done with the time element in cases under the Statute of Anne.[25]

WHAT IS ADMISSIBLE EVIDENCE OF VALUE IN EMINENT DOMAIN. — The recent decision of the United States Circuit Court of Appeals for the First Circuit in the *Cape Cod Canal Condemnation Case*[1] contains a far-reaching discussion of several fundamental questions in the law of eminent domain.

It has always been the law that the value of the property to the taker was not the test, and evidence of the value, as distinguished from the utility, of the property in question for any particular purpose is generally held to be inadmissible; but evidence of the utility or availability of the property for any purpose, including the purpose for which the taker may desire it, has almost universally been admitted. The debatable question is whether this special adaptability for use may be shown when the taker is the only person who can put the property to this par-

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[20] People *v.* Union El. R. R. Co., *supra*, at p. 231. And see State *v.* Mansfield, *supra*, at pp. 152–153, which probably states a rule broader than the authorities admit, in saying that the discretion formerly confined to the initiation of *quo warranto* proceedings is now extended to the stage of determination on the merits.

[21] See p. 74, *supra*.

[22] See cases in note 19, *supra*. The facts of Att'y Gen'l *v.* City of Methuen were well within the rule of these cases, several years having elapsed during which the city received various sorts of recognition from the legislature and carried on without objection the functions of government; and, as the case came up on information, plea, and agreed facts, and seems thus to have been treated as before the court upon the merits, and as the decision is grounded upon these cases, it may in course of time find its place in line with them despite the failure to recognize expressly any exception to the rule of *nullum tempus occurrit regi*.

[23] See HIGH, EXTRAORDINARY LEGAL REMEDIES, 3 ed., 558–559.

[24] *Cf.* Att'y Gen'l *v.* N. Y., N. H. & H. Ry., 197 Mass. 194, 83 N. E. 408 (1908); where the existence of another remedy provided by statute is treated as sufficient ground for declining to exercise in favor of the state the jurisdiction in *quo warranto*.

[25] Winchelsea Causes, 4 Burr. 1962 (1766); King *v.* Dickin, 4 T. R. 282, 284 (1791).

[1] United States *v.* Boston, Cape Cod & New York Canal Co., 271 Fed. 877 (1st Circ., 1921). For the facts of this case see RECENT CASES *infra*, p. 86.